88-1949

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

NAN YA PLASTICS CORPORATION U.S.A.,

Petitioner,

v.

PHILIP R. DeSANTIS,

Respondent.

BRIEF IN OPPOSITION OF PHILIP R. DeSANTIS TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JOHN A. DEZIO
Attorney at Law
414 East Jefferson Street
Post Office Box 2375
Charlottesville, VA 22902
(804) 295-4138
Counsel for Respondent

Brief Printing Specialist, 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) in that a violation of the United States Constitution is alleged.

QUESTION PRESENTED

1. May Virginia courts exercise in personam jurisdiction over a defendant where the Virginia Supreme Court has found that the defendant consummated an employment contract with the plaintiff, a Virginia resident, in the Commonwealth of Virginia after the defendant had sought out and recruited that Virginia resident for employment elsewhere?

CONSTITUTIONAL PROVISION INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

No state shall ...

> deprive any person of life, liberty or property without due process of law ...

U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

Petitioner's statement of the case is accepted.

STATEMENT OF FACTS

The petitioner's statement of the facts is accepted with the following qualification: the primary fact relating to personal jurisdiction is that the employment contract between Nan Ya and DeSantis was consummated in the Commonwealth of Virginia.

ARGUMENT

WHERE THE PETITIONER HAS AGGRESSIVELY REACHED INTO VIRGINIA AND RECRUITED A VIRGINIA RESIDENT FOR EMPLOYMENT ELSEWHERE AND THEN CONSUMMATED AN EMPLOYMENT CONTRACT IN VIRGINIA WITH THAT RESIDENT, THE PETITIONER HAS HAD MINIMUM CONTACTS WITH VIRGINIA AND IS THEREBY

SUBJECT TO IN PERSONAM JURISDICTION UNDER VIRGINIA'S LONG-ARM STATUTE.

The Virginia courts properly ruled that an employment contract was entered into in Virginia by Nan Ya and DeSantis. Contracts are commonly recognized by courts as a matter generally governed by state law. See 17 C.J.S. Contracts Sec. 12(1) (1974). Before applying the Virginia long-arm statute, the Virginia courts had to evaluate Nan Ya's contacts with Virginia. This evaluation required Virginia's courts to make preliminary determinations, according to Virginia law, about the status of Nan Ya's contacts. The Virginia courts found that the employment contract was consummated in Virginia. Slip op. at 7-8. Though reluctantly, Petitioner has conceded the validity of the Virginia courts' determination. Therefore, the true issue

before this Court is whether Virginia's long arm statute constitutionally allows Virginia courts to exercise in personam jurisdiction over Nan Ya in light of the accepted facts.

Virginia's "long-arm" statute, Va. Code Ann. Sec. 8.01-328.1 (Cum. Supp. 1988), allows a Virginia court to exercise in personam jurisdiction over a non-resident corporate defendant. The statute states that a Virginia court "may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's ... [t]ransacting any business" in the Commonwealth of Virginia. Va. Code Ann. Sec. 8.01-328.1(A)(1) (Cum. Supp. 1988). The Virginia Supreme Court has determined that the purpose of the long-arm statute is "to assert jurisdiction, to the extent

permissible under the Due Process Clause of the Constitution of the United States, over nonresidents who engage in some purposeful activity in Virginia." Danville Plywood Corp. v. Plain & Fancy Kitchens, Inc., 218 Va. 533, 534, 238 S.E.2d 800, 802 (1977); Carmichael v. Snyder, 209 Va. 451, 456, 164 S.E.2d 703, 707 (1968). Furthermore, the Virginia long-arm statute has been held to be a "single-act statute requiring only one transaction in Virginia to confer jurisdiction" on Virginia courts since the statute speaks of transacting any business. Slip op. at 6; I.T. Sales v. Dry, 227 Va. 6, 9, 278 S.E.2d 789, __ (1981); Kolbe, Inc. v. Chromodern, Inc., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971).

In I.T. Sales v. Dry, a Virginia corporation, I.T. Sales, entered into an employment contract in Virginia with the

defendant, Felix Dry, in which Dry was to go to work as the plaintiff's West Coast representative. The contract called for Dry to move from his home in Virginia to California. The defendant worked in California until he was terminated. The court held that service of process and jurisdiction existed where the contract was made in Virginia, even though substantially all of the performance under the terms of the contract took place outside of Virginia. I.T.Sales, 227 Va. at 8, 278 S.E.2d at ___. The consummation of the employment contract in Virginia satisfied the single business transaction required under the Virginia long-arm statute. Id. at 9, 278 S.E.2d at __.

In Kolbe, the procurement of a purchase order from a Virginia corporation in Virginia by the agent of a California

manufacturer for the sale and delivery of furniture to a North Carolina purchaser was found to satisfy the single business transaction requirement of the long-arm statute. Kolbe, Inc., 211 Va. 736, 180 S.E.2d 664 (1977).

In both I.T. Sales and Kolbe, the defendant transacted business in Virginia that was sufficiently substantial to give Virginia courts personal jurisdiction under the Virginia long-arm statute. As in both of the above cases, the present cause of action arose from a single contract that was consummated in Virginia. Virtually identical to I.T. Sales, the Nan Ya's employment contract required a Virginia resident to migrate to and work in another state with substantially all of the performance under the terms of the contract to be fulfilled outside of Virginia.

Furthermore, DeSantis, like Dry, moved to another state and began work only for the defendant to later breach the contract.

Accordingly the Virginia Supreme Court correctly found that "Nan Ya aggressively reached into Virginia and recruited a Virginia resident for employment elsewhere" and then contracted in Virginia with the resident. Slip op. at 7-8. Therefore Nan Ya was properly held subject to personal jurisdiction under Virginia's long-arm statute. Id. at 8.

Federal courts have recently endorsed Virginia's long-arm statute and Virginia courts' application of the statute. The Fourth Circuit has even followed the Virginia Supreme Court's lead in giving expansive application to Virginia's long-arm statute. In Viers v. Mounts, 466 F. Supp. 187 (W.D. Va. 1979),

the general jurisdictional rule was stated:

> The court is satisfied that the assertion of in personam jurisdiction by the courts of Virginia over a nonresident defendant for causes of action arising from the consummation of a contract in Virginia between the nonresident and a Virginia citizen is contemplated by the "transacting business" subsection of the Virginia long-arm statute, Darden v. Heck's, Inc., 459 F. Supp. 727 (W.D. Va. 1978); Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968), and is also constitutionally sound. See McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

In Peanut Corp. of America v. Hollywood Brands, Inc., 696 F.2d 311 (4th Cir. 1982), which relies on I.T. Sales, Hollywood Candybar Company sent two purchase orders for peanuts to Peanut Corp. of America (PCA) in Virginia. The second purchase order, a modification letter, served as the basis for the contract. The actual contract was finally made between

the parties by a third purchase order which varied slightly the terms of the second purchase order. The third purchase order was sent from Illinois to Texas. Eventually, PCA sued Hollywood for breach of contract after differences of opinion arose as to Hollywood's expected performance under the contract.

Upholding Virginia personal jurisdiction over the Illinois corporation, the Fourth Circuit Court held:

> Although Hollywood argues that it had no contacts with Virginia concerning the disputed contract, the modification letter, which became a part of the basic contract was addressed to and received by [PCA] in Virginia, telephonic negotiations occurred with one of the participants located in Virginia, and numerous written communiques between the parties were sent to and received in Virginia. <u>There was sufficient "contracting" in Virginia to amount to the transaction of business from which the cause of action arose</u>. <u>See, Kolbe, Inc. v. Chromodern</u>

> Chair Co., supra (long-arm jurisdiction upheld where a foreign corporation secured a written purchase order from the plaintiff in Virginia). Plaintiff's cause of action was a direct result of Hollywood's transaction of business within Virginia, and so the requirement that the cause of action arose from the transacting of the business was clearly satisfied. (Emphasis added.)

Peanut Corp. of America, 696 F.2d at 314.

The present case involves identical in-state contacts, and there can be no doubt that the same "sufficient contracting" took place between DeSantis and Nan Ya in Virginia. Accordingly, "there was sufficient 'contracting' in Virginia to amount to the transaction of business from which the cause arose," and Nan Ya is justly subject to jurisdiction in Virginia.

The United States Supreme Court has written several opinions addressing due

process issues that supply guidance for states in the application of their long-arm statutes. In International Shoe Co. v. Washington, this Court explained that unless a person has "certain minimum contacts" within a forum state so that maintenance of the action does not offend "traditional notions of fair play and substantial justice", the Due Process Clause will protect a person from being subject to the binding judgments of a forum state. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); see Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985). While recognizing a trend "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents", this Court has sustained jurisdiction over a foreign corporation on the basis of a

single contract. McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

In McGee, a Texas insurance company delivered an insurance contract to a California resident who paid the premiums by mail. In a suit on the contract, California process was served on the Texas insurer by registered mail. The Court concluded that both the notice and the minimum contacts requirements of due process had been satisfied before finding that although the defendant insurance company had no office or agent in California, and had never solicited or done any insurance business in California, apart from the insurance contract involved in that case, the company was nevertheless subject to California jurisdiction. McGee, 355 U.S. at 222-224.

As part of the rationale for its

holding, the Court recognized California's interest in providing its citizens with effective means to enforce contracts with foreign businesses. Id. at 223. The Court also acknowledged that the insurer may have been inconvenienced if held amenable to suit in California but refused to find that the insurer would in any way be denied due process. Id. at 224.

Although Nan Ya admittedly maintained no office or resident agent in Virginia, its sole contract with DeSantis in Virginia was enough to satisfy the jurisdictional and Constitutional standards outlined by the Supreme Court in McGee. In this case with Nan Ya, as in McGee, "[t]here is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear." Id. at 224. While McGee dealt

with a single contract of insurance, its rationale is equally applicable to the case at bar.

More recently in Burger King Corp., 471 U.S. 462, the Court summarized the governing considerations for determining whether a state may exercise jurisdiction over a foreign party. The "constitutional touchstone" is whether the defendant "purposefully established minimum contacts with the forum State." Id. at 474; International Shoe Co., 326 U.S. 310, 316 (1945). A second consideration is whether the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." Id. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)). Before a defendant can be expected to "reasonably

anticipate" being haled into another state's court, the defendant must "purposefully avail" itself of the benefits and protection of the forum state's laws. (Citations omitted.) Id. at 474-75. Therefore when a foreign defendant has intentionally established "continuing obligations" between itself and residents of the forum, the defendant has clearly availed itself of the "benefits and protection" of the forum's laws it is presumptively reasonable to require the defendant to submit to the burdens of that forum's litigation as well. (Citations omitted.) Id. at 475-76.

In Burger King Corp., Burger King, a Florida corporation, entered into a contract in Florida with Rudzewicz, a Michigan resident, who intended to operate a Burger King franchise. Burger King

Corp., 471 U.S. 462. Rudzewicz never entered Florida and did not do any business in Florida. Still under the terms of the contract, Rudzewicz had voluntarily entered into a precise relationship with Burger King. Id. at 480. The Court took particular notice of the fact that Rudzewicz "deliberately 'reached[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a longterm franchise and the manifold benefits" that would result from the relationship. Id. at 479-80. Largely based on the fact that Rudzewicz established a "substantial and continuing relationship" with Burger King's Florida headquarters, the Court held that Florida could exercise personal jurisdiction.

Comparable to the facts in Burger King, Nan Ya "deliberately reached out"

beyond Texas and negotiated with DeSantis for the purchase of DeSantis' expertise and the benefits that would result from the employment relationship. Nan Ya clearly intended to establish a "substantial and continuing relationship" with DeSantis. The cause of action at bar arose from a single, yet substantial, business transaction, the employment contract consummated in Virginia.

While the facts of Burger King and the present case are not identical, the crucial facts are congruous. Nan Ya can fairly be characterized as having established "continuing obligations" between itself and DeSantis, a Virginia resident, and therefore has clearly availed itself of the "benefits and protection" of Virginia's laws. Consequently, Nan Ya should have reasonably anticipated being

haled into Virginia's courts.

In another United States Supreme Court case, it was determined that Virginia courts could assert personal jurisdiction over a nonresident business whose only contact with Virginia residents was by mail. Travelers Health Assoc. v. Virginia, 339 U.S. 643 (1950). A nonprofit membership association conducting a mail-order health insurance business, was incorporated in Nebraska, where its only office was located. Without employing paid agents, the association solicited new members in Virginia, usually through the unpaid activities of Virginia residents who were already members; the insurance certificates were delivered through the mail; the association investigated benefit claims in Virginia. The Court held that the contacts of the association with

Virginia were held sufficient to sustain the jurisdiction and consistent with the Due Process Clause.

Similarly, the facts of the present case involve a contract between a resident of the forum state and a foreign corporation, Nan Ya, which maintained no office or resident agent in Virginia and had never done any business in Virginia, apart from the employment contract at issue. Furthermore, all of Nan Ya's contacts with Virginia were by mail or telephone. As indicated by the decision in Traveler's Health Assoc., the fact that all of Nan Ya's contacts with Virginia were by mail or telephone should not bar Virginia courts from exercising in personam jurisdiction over Nan Ya. Based on the McGee decision, Virginia's courts may still exercise jurisdiction despite the

employment contract being Nan Ya's only transaction within Virginia.

The main thrust of Petitioner's argument is that a determination by the Virginia Supreme Court that Nan Ya entered into an employment contract with DeSantis in Virginia should not be employed to decide whether Nan Ya's activities bring Nan Ya under Virginia's long-arm statute. This contention appears to disregard the fact that inherent in any in personam jurisdiction finding is an assessment of the party's contacts with the forum state.

More particularly, courts must frequently make a preliminary determination of where a contract was made before deciding whether in personam jurisdiction exists. Sometimes this determination is simple and obvious. Other times courts are required to look closer at the facts to

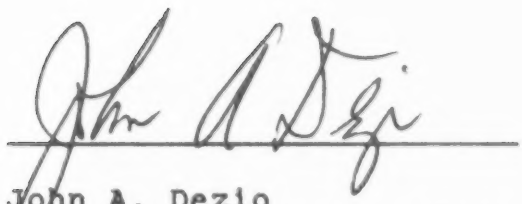
determine where a contract was consummated. A court should not be precluded from making this determination simply because the location of the contract is indistinct or questioned.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

PHILIP R. DeSANTIS

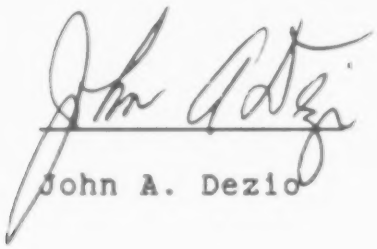
By Counsel



John A. Dezio
414 East Jefferson Street
Charlottesville, Virginia 22901

CERTIFICATE OF SERVICE

I, John A. Dezio, a member of the bar of the United States Supreme Court, hereby certify under oath that on this 9th day of June, I mailed forty (40) copies of this Brief for Respondent in Opposition to the Clerk of this Court, first-class postage prepaid, and that I mailed the required number of copies to J. Lloyd Snook, III, 108 Fifth Street, S.E. Suite 201, P.O. Box 2486, Charlottesville, Virginia 22902, Counsel for Petitioner.



John A. Dezio

STATE OF VIRGINIA

AT LARGE

Sworn and acknowledged before me in the City of Charlottesville this 8th day of June, 1989, by John A. Dezio, counsel for Respondent Philip R. DeSantis.

Sharron Hall Frazier

Sharron Hall Frazier
Notary Public

My commission expires: August 19, 1990